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11

12 **UNITED STATES DISTRICT COURT**

13 **CENTRAL DISTRICT OF CALIFORNIA**  
14  
15

16 LINDA RUBENSTEIN, on behalf of  
17 herself and all others similarly  
situated,

18 Plaintiffs,

19 v.  
20

21 THE NEIMAN MARCUS GROUP  
LLC, a Delaware Limited Liability  
Company, and DOES 1-50,  
22 inclusive,

23 Defendants.  
24  
25  
26  
27  
28

Case No. 2:14-CV-07155-SJO-JPR

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT, CERTIFICATION OF  
THE SETTLEMENT CLASS, SETTING  
A HEARING ON FINAL APPROVAL  
OF SETTLEMENT, AND DIRECTING  
NOTICE TO THE CLASS**

Assigned to Hon. S. James Otero

DATE: May 21, 2018  
TIME: 10:00 a.m.  
Courtroom: 10C

Complaint Filed: August 14, 2014

## Table of Contents

I.	BACKGROUND OF LITIGATION AND SETTLEMENT .....	1
	A. Known Class Members .....	4
	B. Unknown Class Members .....	4
III.	THE COURT SHOULD PRELIMINARILY CERTIFY THE PROPOSED SETTLEMENT CLASS.....	6
	A. The Numerosity Requirement is Met.....	6
	B. The Commonality Requirement is Met.....	7
	C. The Typicality Requirement is Met.....	7
	D. Plaintiff and Class Counsel Are Adequate Representatives .....	8
	E. The Proposed Settlement Class Meets Rule 23(b)(2) and (3) ...	9
IV.	III. THE COURT SHOULD PRELIMINARILY APPROVE THE .....	10
V.	SETTLEMENT AGREEMENT UNDER RULE 23(e)(2).....	10
	A. The Strength of Plaintiff’s Case and the Risk, Expense, Complexity, and Likely Duration of Further Litigation .....	11
	B. The Amount Offered in Settlement.....	12
	D. The Experience and Views of Counsel .....	16
	E. The Proposed Class Members’ Reaction.....	17
	F. Lack of Collusion Between the Parties.....	17
VI.	IV. THE PROPOSED NOTICE SHOULD BE APPROVED .....	18
VII.	V. The Court Should Adopt the Parties’ Proposed Schedule .....	20
VIII.	VI. CONCLUSION .....	21

## TABLE OF AUTHORITIES

### Cases

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	9
<i>Caldera v. J.M. Smucker Co.</i> , 2014 WL 1477400 (C.D. Cal. Apr. 15, 2014) .....	13
<i>Celano v. Marriot Int’l, Inc.</i> , 242 F.R.D. 544 (N.D. Cal. 2007) .....	7
<i>Chamberlan v. Ford Motor Co.</i> , 402 F.3d 952 (9th Cir. 2005).....	9
<i>Chowning v. Kohl’s Dep’t Stores, Inc.</i> , 2016 WL 1072129 (C.D. Cal. Mar. 15, 2016) .....	13
<i>Dukes v. Wal-Mart</i> , 603 F.3d 571 (9th Cir. 2010).....	8
<i>Gen. Tel. Co. of Sw. v. Falcon</i> , 457 U.S. 147 (1982) .....	8
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998).....	6, 7, 8, 16
<i>In re Mego Fin. Corp. Sec. Litig.</i> , 213 F.3d 454 (9th Cir. 2000).....	11
<i>In re Portal Software, Inc. Sec. Litig.</i> , No. C-03-5138 VRW, 2007 WL 1991529 (N.D. Cal. June 30, 2007) .....	6
<i>In re Tableware Antitrust Litig.</i> , 484 F. Supp. 2d 1078 (N.D. Cal. 2007) .....	11
<i>Jaffe v. Morgan Stanley &amp; Co., Inc.</i> , No. C-06-3903 THE, 2008 WL 346417 (N.D. Cal. Feb. 7, 2008) .....	6
<i>Linney v. Cellular Alaska P’ship</i> , C-96-3008 DLJ, 1997 WL 450064 (N.D. Cal. July 18, 1997).....	16
<i>Molski v. Gleich</i> , 318 F.3d 937 (9th Cir. 2003).....	15
<i>Officers for Justice v. Civil Serv. Comm’n</i> , 688 F.2d 615 (9th Cir. 1982).....	17
<i>Pierce v. County of Orange</i> , 526 F.3d 1190 (9th Cir. 2008).....	9

1	<i>Rodriguez v. West Publishing Corp.</i> ,	
2	563 F.3d 948 (9th Cir. 2009).....	12, 16
3	<i>Russel v. Kohl's Dep't Stores, Inc.</i> ,	
4	2015 WL 12748629 (C.D. Cal. Dec. 4, 2015) .....	14
5	<i>Satchell v. Fed. Exp. Corp.</i> , No. C,	
6	03-2659 SI, 2007 WL 1114010 (N.D.Cal. Apr. 13, 2007) .....	18
7	<i>Torrisi v. Tucson Elec. Power Co.</i> ,	
8	8 F.3d 1370 (9th Cir. 1993).....	18
9	<i>Wal-Mart Stores, Inc. v. Dukes</i> ,	
10	131 S.Ct. 2541 (2011) .....	7, 8, 10
11	Statutes	
12	<i>Business &amp; Professions Code</i> § 17200 .....	1
13	<i>Business &amp; Professions Code</i> § 17500 .....	1
14	<i>Civil Code</i> § 1750 .....	1
15	Rules	
16	Fed. R. Civ. P. 23(a)(1).....	6
17	Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii) .....	19
18	Fed. R. Civ. P. 23(e)(1).....	19
19	Rule 23 .....	1, 6
20	Rule 23(a) .....	6
21	Rule 23(a)(2).....	7
22	Rule 23(a)(3).....	7, 8
23	Rule 23(a)(4) and Rule 23(g).....	8
24	Rule 23(b) .....	6
25	Rule 23(b)(2).....	10
26	Rule 23(b)(2) and (3) .....	2, 6, 9
27	Rule 23(b)(3).....	9
28	Rule 23(c)(2)(B) .....	5, 19
	Rule 23(e)(2).....	10, 12
	Rules 23(c)(2)(B) and 23(e)(1).....	5

1	Rule 23(c)(2).....	1
2	Rules 23(c)(2)(B)(v) and 23(e)(4) .....	6
3	Other Authorities	
4		
5	L.R. 7 .....	2
6	Manual for Complex Litigation (Fourth) § 21.62 .....	12
7	Manual for Complex Litigation (Fourth) § 21.632 .....	6, 10
8	Manual for Complex Litigation (Fourth) § 21.633 .....	18
9	NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2010) .....	6
10		
11		
12		
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1       **I. BACKGROUND OF LITIGATION AND SETTLEMENT**

2       Plaintiff Linda Rubenstein (“Plaintiff”) respectfully submits this memorandum  
3       in support of her Motion for Preliminary Approval of Class Action Settlement  
4       under Federal Rules of Civil Procedure (“Rule”) 23(c)(2) and (e). The Parties  
5       resolved this lawsuit (the “Action”) after significant discovery, many months of  
6       arm’s length negotiation, exchanges of relevant information, and the mediation  
7       expertise of the Honorable Carl West (Ret.). (“Mediator”)

8       Plaintiff brought the Action pursuant to Rule 23 on behalf of herself and all  
9       others similarly situated, seeking to represent all persons who purchased products  
10      from defendant Neiman Marcus Group LLC’s (“Neiman”) Last Call stores in  
11      California labeled with a “Compared to” price, but which products Plaintiff alleged  
12      were never sold at Neiman flagship retail stores at or above the advertised  
13      “Compared to” price and such products of like grade and quality were not being  
14      sold at the “Compared to” price at the time of the purchase in the area of the Last  
15      Call store.<sup>1</sup> [See Third Amended Complaint (“TAC”), Docket Entry (“D.E.”) 69]  
16      Like all Settlement Class Members she seeks to represent, Plaintiff purchased  
17      products from Last Call advertised with a “Compared to” price. (*See Id.*) In her  
18      TAC, Plaintiff alleges Neiman’s conduct violated California’s False Advertising  
19      Laws, *Business & Professions Code* § 17500 *et seq.* (“FAL”), California’s Unfair  
20      Competition Law, *Business & Professions Code* § 17200 *et seq.* (“UCL”), and  
21      California’s Consumer Legal Remedies Act, *Civil Code* § 1750 *et seq.* (“CLRA”).

22       **Procedural History of the Mediation**

23      During the course of the litigation, the Parties engaged in extensive motion  
24      practice, and written and oral discovery. Percipient and expert witnesses were  
25      deposed. In or about July 2017, Plaintiff and Neiman agreed to mediate the issues

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26  
27      <sup>1</sup> Plaintiff also sought to represent all California purchasers who bought  
28      products Neiman advertised with a “Compared to” price on the Last Call e-  
commerce website.

1 in the Action before the Mediator. The Parties engaged in settlement discussions,  
2 which included numerous telephonic calls, exchanges of relevant information,  
3 submission of mediation briefs, and in-person sessions with the Mediator on August  
4 4, 2017 and on December 7, 2017, with discussions ongoing thereafter.<sup>2</sup> On  
5 December 13, 2017, the Parties agreed to preliminary settlement terms. After  
6 months further negotiating final, detailed settlement terms, the Parties fully  
7 executed the settlement agreement on April 18, 2018. *See* Settlement Agreement  
8 and exhibits, Ex. A to Fields Declaration (“Fields Decl.”).

9 **Summary of the Proposed Settlement**<sup>3</sup>

10 The Parties’ Settlement Agreement proposes certification of a Settlement  
11 Class in the Action pursuant to Rule 23(b)(2) and (3) consisting of:

12 all natural persons who purchased one or more products advertised  
13 with a “Compared to” price, where such purchase was made from  
14 August 7, 2010 through the date of the Preliminary Approval Order,<sup>4</sup>  
15 at any of Neiman’s Last Call stores in California or on Last Call’s e-  
16 commerce website if the purchaser provided a California billing  
address.

17 The Settlement Agreement provides for Neiman to pay a Gross Settlement Amount  
18 of \$2,900,000 to be held in a Qualified Settlement Fund (“QSF”). Participating  
19

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20 <sup>2</sup>Between the in-person mediation sessions, Plaintiff filed her TAC on  
21 September 11, 2017 (D.E. 69), and moved to certify a California Class on  
22 September 12, 2017 (D.E. 70) which Neiman thereafter opposed (D.E. 79). The  
Action was settled before the Court ruled on the class certification motion.

23 <sup>3</sup>All terms are defined in the Settlement Agreement (Fields Decl., Ex. A).

24 <sup>4</sup>In the Settlement Agreement, the Parties inadvertently defined the Class  
25 Period to run through the date of the *Final* Approval Order, rather than the  
26 Preliminary Approval Order. Upon consultation of counsel pursuant to L.R. 7-3  
27 prior to the filing of this motion, it was agreed that, for obvious logistical and due  
28 process reasons, the Class Period should instead end upon issuance of the  
Preliminary Approval Order. Accordingly, by this motion, Plaintiff moves for  
certification (for settlement purposes, only) of a class bounded by a period ending  
upon the Preliminary Approval Order.

1 Class Members may make a claim for monetary compensation from the Net  
2 Settlement Fund, i.e. the Gross Settlement Amount minus Claims Administrator  
3 Fees and Expenses (not to exceed \$400,000), and minus awards the Court may  
4 grant Plaintiff and her counsel.<sup>5</sup> Each Participating Settlement Class Member shall  
5 be entitled to recover from the Net Settlement Fund based on point allocations  
6 involving the total purchase price of all Qualifying Purchases, with consideration of  
7 whether Proof of Purchase is provided. Neiman also will implement in-store  
8 signage and a website posting concerning its “Compared to” prices if such prices  
9 are used, in addition to employee training on the issue.

10 **Individual Class Member Benefit**

11 The proposed Settlement Agreement (Fields Decl., Ex. A) provides proposed  
12 Settlement Class Members substantial benefit: payment to each qualifying  
13 participant from a portion of the Net Settlement Fund. Specifically, each  
14 Authorized Claimant will be assigned points that will be divided by the total points  
15 of all Authorized Claimants who submit timely and valid Claim Forms. The  
16 quotient shall be the percentage of the Net Settlement Fund each Authorized  
17 Claimant will receive. Points are determined by the purchase price, including tax,  
18 of all Qualifying Purchases by the Authorized Claimant, with additional points  
19 available with Proof of Purchase.<sup>6</sup> Essentially, each Authorized Claimant receives  
20 a proportional share of the Net Settlement Fund, which will amount to at least  
21 \$1,625,000 (after administrative expenses, attorneys fees/costs, and a Plaintiff  
22 service payment that may be awarded are deducted), based on the total amount of  
23 purchases made at California Last Call Stores or online, and whether Proof of  
24 Purchase is provided. No reversionary interest to Neiman exists as to any amount

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25 <sup>5</sup>Settlement Class Counsel Fees and Litigation Expenses Payment is not to  
26 exceed \$870,000 plus costs; Settlement Class Representative Payment is not to  
27 exceed \$5,000.

28 <sup>6</sup> Section 3.5(a) of the Settlement Agreement (at pages 10-12) details the  
point allocation and payment distribution processes. *See* Fields Decl., Ex. A.



1 of the Gross Settlement Fund as the entire fund will be distributed to claimants.  
2 Any funds remaining in the Net Settlement Fund at the end due to uncashed checks  
3 will be distributed to Public Counsel, the Parties' designated *Cy Pres* recipient.

4 **Notice**

5 **A. Known Class Members**

6 Notice to known class members, i.e., class members for which Neiman has  
7 either an e-mail or mailing address, will be sent directly via e-mail, or if no e-mail  
8 address is available or the e-mail address results in a bounce-back, via U.S. mail.

9 A copy of the "Email Notice" substantially in the form of Exhibit 1 to the  
10 Settlement Agreement (Fields Decl., Ex. A), shall be emailed to Settlement Class  
11 Members by the Claims Administrator per the Settlement Agreement's section  
12 5.1(a) within thirty (30) days of the Court's entry of the preliminary approval order.

13 To the extent Email Notice is impossible, impracticable or unsuccessful, a  
14 Post-Card Notice substantially in the form of Exhibit 1 to the Settlement Agreement  
15 (Fields Decl., Ex. A) shall be sent via U.S. Mail to direct Known Settlement Class  
16 Members to the Settlement Website, not later than thirty (30) days after the Court  
17 enters the Preliminary Approval Order or within seven (7) days after an e-mail  
18 bounce-back is received, if Neiman has a physical address for such Known  
19 Settlement Class Member.

20 **B. Unknown Class Members**

21 Section 5.2(a) of the Settlement Agreement provides in relevant part that no  
22 later than thirty (30) days after the Court enters its Preliminary Approval Order, the  
23 Claims Administrator will run a Summary Publication Notice in one or more print  
24 publications substantially in the form of Exhibit 2 to the Settlement Agreement  
25 (Fields Decl., Ex. A), and publish internet notice sufficient, in the expert opinion of  
26 the Claims Administrator, to provide adequate legal notice to Unknown Settlement  
27 Class Members in California, to the extent reasonably practicable.

28 In addition, the Claims Administrator will establish a toll-free number and

1 create and maintain a Settlement Website containing the Settlement Class Notice  
2 (substantially in the form of **Exhibit 3**), Claim Form (substantially in the form of  
3 **Exhibit 4**), and Opt-Out Form (substantially in the form of **Exhibit 5**), and  
4 instructions for submitting objections. Claims Forms will be able to be downloaded  
5 from this website and submitted online.

6 This notice to Settlement Class Members is reasonable, appropriate, satisfies  
7 due process, and is the best notice practicable here, per Rules 23(c)(2)(B) and  
8 23(e)(1). It provides individual notice to a vast number of Settlement Class  
9 Members<sup>7</sup>, and wide publication notice to Unknown Settlement Class Members.

10 Similarly, the manner of providing for opt-outs in Section 8.2 of the  
11 Settlement Agreement is reasonable, appropriate and satisfies Rule 23(c)(2)(B). The  
12 Email Notice, Post-Card Notice and the Settlement Class Notice will instruct  
13 Settlement Class Members wishing to exclude themselves from the Settlement to  
14 mail to the Claims Administrator, no later than sixty (60) days after Settlement  
15 Class Notice is disseminated, a signed Opt-Out Form. A Settlement Class Member  
16 who submits a timely and valid Opt-Out Form shall be considered a Non-  
17 Participating Class Member and will not be bound by the Settlement.

#### 18 **Actions Requested of the Court**

19 By this Motion, Plaintiff requests the Court enter a “Notice Order” granting  
20 preliminary approval. (See Proposed Order of Preliminary Approval of Settlement).  
21 That Order authorizes the tasks necessary to allow the proposed settlement process  
22 to commence. Those tasks include: (a) conditionally certifying the Settlement  
23 Class for settlement purposes only; (b) appointing the Claims Administrator and  
24 establishing the QSF; (c) providing notice of the Settlement to affected persons per  
25

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26 <sup>7</sup> For example, during their investigation, Plaintiff’s counsel determined  
27 Neiman has email addresses for 177,619 Settlement Class Members who made  
28 purchases at California Last Call stores and for 279,397 Settlement Class Members  
who made Qualifying Purchases online. (Fields Decl., ¶ 3)

1 the Settlement Agreement's terms; (d) establishing procedures for objections to and  
2 exclusions from the proposed Settlement; (e) setting a date for the Fairness  
3 Hearing; and (f) appointing Class Counsel and the Class Representative.

4 **II. THE COURT SHOULD PRELIMINARILY CERTIFY THE**  
5 **PROPOSED SETTLEMENT CLASS**

6 Plaintiff proposes the Court provisionally certify this action as a class  
7 action under Rule 23 for settlement purposes. The Court must satisfy itself, at least  
8 conditionally, that Rule 23's requirements are met, and that Plaintiff may be  
9 properly appointed Class Representative. *See* Manual for Complex Litigation  
10 (Fourth) § 21.632 ["The judge should make a preliminary determination that the  
11 proposed class satisfies the criteria set out in Rule 23(a) and at least one of the  
12 subsections of Rule 23(b)."] 4 William B. Rubenstein, Alba Conte & Herbert B.  
13 Newberg, NEWBERG ON CLASS ACTIONS § 11.25 (4th ed. 2010). Provisional  
14 certification is an appropriate device where an agreement to settle occurs before a  
15 class is certified for litigation. *See, e.g. Jaffe v. Morgan Stanley & Co., Inc.*, No. C-  
16 06-3903 THE, 2008 WL 346417, at \*2-3 (N.D. Cal. Feb. 7, 2008); *In re Portal*  
17 *Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 1991529, at \*2-3 (N.D.  
18 Cal. June 30, 2007). Although Neiman would, if contesting class certification on  
19 the merits, argue otherwise, the Parties have agreed for settlement purposes the  
20 Settlement Class may be certified under Rule 23(b)(2) and (3). The Settlement  
21 Agreement and proposed notice allow Settlement Class Members to exclude  
22 themselves from the Settlement Class as Rules 23(c)(2)(B)(v) and 23(e)(4) require.

23 **A. The Numerosity Requirement is Met**

24 Rule 23(a)(1) allows a class action to be maintained if "joinder of all  
25 members is impracticable" owing primarily, to the large number of people in  
26 the proposed class. Fed. R. Civ. P. 23(a)(1); *see also Hanlon v. Chrysler*  
27 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Generally, the numerosity  
28 requirement is satisfied when the class compromises 40 or more members.

1 *See Celano v. Marriot Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007). In  
2 this case, the proposed Settlement Class includes hundreds of thousands of  
3 Known Settlement Class Members (*see* Fields Decl., ¶ 3), and an unknown  
4 number of Unknown Settlement Class Members. Size renders joinder  
5 impracticable here, satisfying numerosity. *See Hanlon*, 150 F.3d at 1019.

6 **B. The Commonality Requirement is Met**

7 Rule 23(a)(2) allows a class action to be maintained if “there are  
8 questions of law or fact common to the class.” “Commonality requires the  
9 plaintiff to demonstrate that the class members ‘have suffered the same  
10 injury.’” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). In  
11 other words, the claims of the class members: “must depend on a common  
12 contention ... [which] must be of such a nature that it is capable of classwide  
13 resolution—which means that a determination of its truth or falsity will  
14 resolve an issue that is central to the validity of each one of the claims in one  
15 stroke.” *Id.* Here, Settlement Class membership means each Settlement  
16 Class Member, by definition, purchased one or more product(s) advertised as  
17 having a “Compared to” price at California Last Call stores or online. In the  
18 TAC, Plaintiff contends on behalf of each Class Member that Neiman’s  
19 conduct violated the FAL, CLRA, and UCL. (*See* D.E. 69) Each Settlement  
20 Class Member was subjected to the challenged conduct, so Plaintiff believes  
21 answers to common questions, i.e. whether Neiman violated those statutes,  
22 and whether Plaintiff and Class Members are entitled to relief, would resolve  
23 the claims. Plaintiff contends Settlement Class Members’ claims “stem from  
24 the same source,” and commonality exists. *Hanlon*, 150 F.3d at 1019-20.

25 **C. The Typicality Requirement is Met**

26 Rule 23(a)(3) requires “the claims or defenses of the representative  
27 parties [to be] typical of the claims or defenses of the class.” Fed. R. Civ. P.  
28 23(a)(3). “Under the rule’s permissive standards, representative claims are

1 ‘typical’ if they are reasonably coextensive with those of absent class  
2 members; they need not be substantially identical.” *Dukes v. Wal-Mart*, 603  
3 F.3d 571, 613 (9th Cir. 2010)(en banc), *quoting Hanlon*, 150 F.3d at 1020,  
4 *rev’d on other grounds*, 131 S.Ct. 2541 (2011). As to the representative,  
5 “[t]ypicality requires that the named plaintiffs be members of the class they  
6 represent.” *Id.* at 613, *citing Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147,  
7 156 (1982). The commonality, typicality, adequacy-of-representation  
8 requirements “tend to merge” with each other. *Dukes*, 131 S.Ct. at 2551 n.5  
9 (citing *Gen. Tel. Co. of Sw.*, 457 U.S. at 157-58).

10 Plaintiff here, like Settlement Class Members, purchased product(s)  
11 advertised with a “Compared to” price at California Last Call stores or on  
12 the Last Call e-commerce website. She shares interest in redressing claims  
13 with the Settlement Class, her claims are typical, and Rule 23(a)(3) is met.

14 **D. Plaintiff and Class Counsel Are Adequate Representatives**

15 Finally, Rule 23(a)(4) and Rule 23(g) together require the named  
16 plaintiff and proposed Class Counsel be able to “fairly and adequately”  
17 protect and represent the interests of the class, respectively. “Resolution of  
18 two questions determines legal adequacy: (1) do the named plaintiffs and  
19 their counsel have any conflicts of interest with other class members and (2)  
20 will the named plaintiffs and their counsel prosecute the action vigorously  
21 on behalf of the class?” *Hanlon*, 150 F.3d at 1020.

22 Here, no conflicts of interest between the Class Representative, Class  
23 Counsel, and any members of the proposed Settlement Class exist on any  
24 issues. Further, the Class Representative and Class Counsel have already  
25 vigorously prosecuted the Action on behalf of the Settlement Class,  
26 including filing and service of the lawsuit, serving initial disclosures,  
27 opposing multiple motions to dismiss, prevailing on a Ninth Circuit appeal,  
28 propounding significant written discovery, analyzing materials Neiman

1 provided, moving for class certification, engaging in settlement discussions,  
2 and moving the action forward to resolution. Kirtland & Packard LLP's  
3 resume is attached to FieldsDeclaration. (Fields Decl., ¶ 2 and Ex. B)

4 **E. The Proposed Settlement Class Meets Rule 23(b)(2) and (3)**

5 Rule 23(b)(3) provides a class action may be maintained where  
6 questions of law and fact common to members of the class predominate over  
7 any questions affecting only individuals, and the class action mechanism is  
8 superior to other available methods for the fair and efficient adjudication of  
9 the controversy. Fed. R. Civ. P. 23(b)(3); *Pierce v. County of Orange*, 526  
10 F.3d 1190, 1197 n.5 (9th Cir. 2008). Settlement is proposed, so the Court  
11 need not consider trial manageability for settlement class certification  
12 purposes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).  
13 (citation omitted).

14 The predominance inquiry focuses on the relationship between  
15 common and individual issues and “whether proposed classes are sufficiently  
16 cohesive to warrant adjudication by representation.” *Id.* at 594. Common  
17 issues predominate where a common nucleus of facts and potential legal  
18 remedies dominate the litigation. *See Chamberlan v. Ford Motor Co.*, 402  
19 F.3d 952, 962 (9th Cir. 2005). Here, Plaintiff believes her claims arise out of  
20 the same uniform course of conduct that, by definition, all Settlement Class  
21 Members experienced in a uniform manner. For settlement purposes, where  
22 manageability of trying the case need not be considered, the predominance  
23 requirement is satisfied.

24 In addition, a class action is superior to any other method available to  
25 fairly, adequately, and efficiently resolve the proposed Settlement Class  
26 Members' claims. Without a class action, most would find litigation costs  
27 prohibitive; if they did sue in large numbers, multiple individual actions  
28 would inefficiently use the Court's and Parties' resources. Thus, Plaintiff

1 believes a class action is the superior method of adjudicating the Action.

2 Finally, to the extent the Settlement Agreement also provides for  
3 certain injunctive relief (*see* § 4), Plaintiff additionally seeks to certify the  
4 Settlement Class pursuant to Rule 23(b)(2). That provision applies where  
5 “the party opposing the class has acted or refused to act on grounds that  
6 apply generally to the class, so that final injunctive relief or corresponding  
7 declaratory relief is appropriate respecting the class as a whole.” Fed. R.  
8 Civ. P. 23(b)(2); *see also Wal-Mart Stores, Inc.*, 131 S.Ct. at 2557 (Rule  
9 23(b)(2) applies “when a single injunction or declaratory judgment would  
10 provide relief to each member of the class”). The agreed-to injunctive relief  
11 relates to implementation of disclosures and other measures concerning  
12 Neiman’s use of “Compared To” or similar pricing. *See* Settlement  
13 Agreement, § 4. By definition, all Settlement Class Members purchased  
14 products advertised with a “Compared To” price, and thus the proposed  
15 injunctive relief is appropriate classwide, consistent with Rule 23(b)(2).

16 **III. THE COURT SHOULD PRELIMINARILY APPROVE THE**  
17 **SETTLEMENT AGREEMENT UNDER RULE 23(e)(2)**

18 Preliminary approval requires only that the Court evaluate whether the  
19 proposed settlement: (1) was negotiated at arm’s length, and (2) is within the  
20 range of possible litigation outcomes such that “probable cause” exists to  
21 disseminate notice and begin the formal fairness process. *See* Manual for  
22 Complex Litigation (Fourth) § 21.632-33. The Ninth Circuit identifies  
23 numerous factors to assess whether a settlement proposal is fundamentally  
24 fair, adequate and reasonable: (1) the strength of the plaintiffs’ case and the  
25 risk, expense, complexity, and likely duration of further litigation; (2) the  
26 amount offered in settlement; (3) the extent of discovery completed and the  
27 stage of the proceedings; (4) the experience and views of counsel; (5) the  
28 reaction of the class members to the proposed settlement; and (6) any



1 collusion between the parties. *See In re Mego Fin. Corp. Sec. Litig.*, 213  
2 F.3d 454, 458-60 (9th Cir. 2000). To preliminarily assess the proposed  
3 settlement's reasonableness, the Court should review the settlement's  
4 substance and the process utilized to reach it. *In re Tableware Antitrust*  
5 *Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("preliminary approval  
6 ... has both a procedural and substantive requirement"). Each factor supports  
7 finding the settlement here is fundamentally fair, adequate and reasonable.

8 **A. The Strength of Plaintiff's Case and the Risk, Expense,**  
9 **Complexity, and Likely Duration of Further Litigation**

10 Neiman has raised, and would continue to raise, challenges to the  
11 claims' legal and factual bases. Neiman has contended, among other things,  
12 Plaintiff cannot meet her burden to certify a class, because, according to it,  
13 reliance and alleged deception are not common issues, and require  
14 individualized determinations. Separately, Neiman has contended Plaintiff  
15 cannot prove individual or classwide damages, and that it will prevail on  
16 summary judgment against Plaintiff's claims on that basis.

17 Although Plaintiff continues to believe in her claims, Plaintiff  
18 acknowledges risks associated with class certification, and also risks of  
19 losing on the merits. The most significant risk is a Court may reject  
20 Plaintiffs' damages models, individual or classwide. The Parties differ as to  
21 Plaintiff's likelihood of ultimately prevailing after judgment and appeal;  
22 however, it is apparent the proposed class has risk litigating the Action.

23 By contrast, the proposed settlement immediately provides the  
24 certainty of valuable benefit to proposed Settlement Class Members. The  
25 proposed settlement offers all proposed Settlement Class Members a portion  
26 of the price of items they purchased advertised as having a "Compared to"  
27 price, i.e. a portion of the financial cost they incurred as a result of the  
28 challenged practice. If the case is not settled, it would necessitate



1 continuing to prosecute the litigation through trial and, even if successful  
2 there, through a potential appeal. Even if Plaintiff eventually succeeds, there  
3 is still the certainty that if the case proceeds in litigation, any potential  
4 benefits to the proposed class would be delayed for many years.

5 This Settlement Agreement, like all settlements, strikes a balance  
6 between the maximum possible recovery the proposed Settlement Class  
7 might obtain by pursuing litigation to the very end, and the risk of failing to  
8 obtain any recovery should Neiman prevail. In determining whether this  
9 Settlement Agreement is sufficiently fair, adequate and reasonable to justify  
10 dissemination of notice to the Settlement Class and scheduling the Fairness  
11 Hearing, the Court need only inquire whether the consideration provided to  
12 the proposed Settlement Class as the Gross Settlement Amount falls within a  
13 reasonable range of settlement “by considering the likelihood of a plaintiffs’  
14 or defense verdict, the potential recovery, and the chances of obtaining it,  
15 discounted to present value.” *Rodriguez v. West Publishing Corp.*, 563 F.3d  
16 948, 965 (9th Cir. 2009), *citing* Manual for Complex Litigation (Fourth) §  
17 21.62. The answer to that question is most certainly “yes.”

18 The advantages to proposed Settlement Class Members of approving  
19 the proposed settlement and quickly distributing to them the consideration  
20 provided exceed what is likely to occur if this case proceeds on a litigation  
21 track. For this reason, the strength of Plaintiffs’ case and the risk, expense,  
22 complexity, and likely duration of further litigation suggest the proposed  
23 settlement agreement is fair, reasonable and adequate under Rule 23(e)(2).

24 **B. The Amount Offered in Settlement**

25 In light of litigation uncertainties, the proposed settlement offer’s  
26 value is adequate. Neiman will pay the Gross Settlement Amount of  
27 \$2,900,000. This amount represents a significant recovery considering all of  
28 Neiman’s proffered defenses, particularly as to proposed classwide damages.

1 Plaintiff believes a particularly straightforward and appropriate method for  
2 calculating damages involves a purchase price minus depreciation model. (Fields  
3 Decl., ¶ 4) Based on the purchase price minus depreciation model, and given the  
4 length of the class period, Plaintiff calculated an absolute best case scenario  
5 recovery (100%) of class-wide damages obtained at trial for putative class members  
6 could possibly amount to as much as \$120 million. This model, however, would  
7 still involve the return of the purchased product to Neiman, an onerous undertaking.  
8 Under the current settlement, however, class members are entitled to retain their  
9 purchases, therefore significantly discounting the actual benefit potentially received  
10 at trial by the class members of even this calculation. (*Id.*)

11 According to Neiman, however, the best-case scenario Plaintiff presents  
12 above is drastically inflated, because it contends no damages exist at all.<sup>8</sup> Neiman  
13 contends applicable damages, if any, could only be determined from the price  
14 Plaintiff and putative class members paid for Last Call products measured against  
15 the value they received. However, Neiman contends this proposed calculation  
16 results in *zero dollars* in damages because customers of Last Call chose to purchase  
17 the “Compared to” items precisely at the prices paid. Given other results on this  
18 very issue in similar cases in this Circuit, a reasonable likelihood exists Neiman  
19 could prevail on its damages defenses, and Plaintiff would neither recover any  
20 damages nor certify a damages class. *See, e.g. Chowning v. Kohl’s Dep’t Stores,*  
21 *Inc.*, 2016 WL 1072129, at \*6-9 (C.D. Cal. Mar. 15, 2016) (currently appealed to  
22 Ninth Circuit but granting defendant summary judgment by rejecting all plaintiff’s  
23 proposed damages models, i.e. (1) full refund model; (2) disgorgement of profits;  
24 (3) actual discount model; and (4) price/value differential); *see also, e.g., Caldera v.*  
25 *J.M. Smucker Co.*, 2014 WL 1477400, at \*4 (C.D. Cal. Apr. 15, 2014) (rejecting  
26 damages model, specifically stating “the true value of the products to consumers

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27 <sup>8</sup> Plaintiff can provide further specific information on calculating potential class-  
28 wide damages with her final approval motion if the Court seeks such information.

1 likely varies depending on individual consumer's motivation for purchasing the  
2 products at issue."); *Russel v. Kohl's Dep't Stores, Inc.*, 2015 WL 12748629, at \*6-  
3 7 (C.D. Cal. Dec. 4, 2015) (declining to certify monetary damages class).

4 Although Plaintiff contends she and members of the putative class have been  
5 deceived and are entitled to a full refund of the purchase price were the Action to be  
6 litigated, Plaintiff acknowledges it is unlikely such a damages model would be  
7 adopted given the proffered defenses. Thus, in the settlement context Plaintiff  
8 believes a realistic, conservative method for evaluating damages is but a fraction of  
9 the purchase price minus depreciation model set forth above. Neiman's contention  
10 that the value Last Call purchasers receive is essentially the same to the products'  
11 purchase prices also makes estimating the appropriate value of any discount  
12 difficult from Plaintiff's perspective. Considering no Settlement Class Members  
13 would have to return items purchased under the proposed settlement, each retains  
14 whatever value the products have or had in addition to the value obtained through  
15 this settlement. Lastly, given the experience with other class action litigation, only  
16 a small percentage of Settlement Class Members are anticipated to claim the value  
17 offered, as is typical in these types of settlements, so each Authorized Claimant will  
18 likely get a higher percentage of value under the Settlement Agreement. Thus, in  
19 light of all these considerations, the \$2,900,000 Gross Settlement Amount  
20 constitutes valuable consideration.<sup>9</sup> Further, the Settlement Agreement also  
21 provides for certain injunctive relief relating to Defendant's use of "Compared To"  
22 or similar pricing. *See* Settlement Agreement, § 4.

23 Given the inherent risks of litigation, the settlement provides a  
24 substantial recovery to each Settlement Class Member. From the Gross

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25 <sup>9</sup> The Gross Settlement Amount is in line with other approved class action  
26 settlements in similar cases in this Circuit. *See, e.g. Gatinella v. Michael Kors*,  
27 Case No. 1:14-cv-05731, S.D.N.Y. Feb. 9, 2016 (granting final approval of class  
28 action settlement where \$4,875,000 paid into common fund as consideration for  
settlement of alleged deceptive pricing tag case.)

1 Settlement Amount of \$2,900,000, as would be customary even in individual  
2 contingency fee litigation, the Settlement Class Counsel Fees and Litigation  
3 Expense Payment, as the Court awards, will then be deducted, as will the  
4 Claims Administrator's Fees and the Settlement Class Representative  
5 Payment, as awarded. The remaining amount, i.e. the Net Settlement Fund,  
6 which cannot be less than \$1,625,000 minus Plaintiff's Counsel's costs only,  
7 will then be drawn from to provide each Settlement Class Member a payment  
8 determined by a point system based on purchase prices, including tax, of the  
9 Qualifying Purchases made, and whether Proof of Purchase is provided. The  
10 *entire* Net Settlement Fund shall be allocated to pay the claims of Settlement  
11 Class Members who submit valid and timely Claim Forms. (Ex. 4 to  
12 Settlement Agreement) The calculation to determine each Settlement Class  
13 Member's Payment from the Net Settlement is provided in full in the  
14 Settlement Agreement, Section 3.5(a), but can be summarized is as follows:

15 Each Authorized Claimant will receive a pro-rata share of the Net  
16 Settlement fund based upon the points assigned to that claimant.  
17 Authorized Claimants who do not submit Proof(s) of Purchase, will  
18 receive one (1) point. Authorized Claimants who submit Proof(s) of  
19 Purchase will receive 4 points for up to the first \$200 of documented  
20 purchases plus 1 point for each additional \$200 in documented  
21 purchases, up to a maximum of 10 points per Authorized Claimant.

22 (Fields Decl., ¶ 4) This is valuable consideration.<sup>10</sup>

23 **C. The Extent of Discovery Completed and Proceedings Stage**

24 The amount of discovery obtained prior to settlement is a factor in  
25 determining the settlement's fairness. *See Molski v. Gleich*, 318 F.3d 937,  
26 953 (9th Cir. 2003). Here, the Parties completed significant discovery.  
27 After initial disclosures were exchanged, Plaintiff propounded several sets of  
28 interrogatories and requests for production of documents on Neiman, to

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<sup>10</sup>The Settlement Agreement, Section 3.5(d), also provides for a *Cy Pres* distribution of the sum of any settlement checks not cashed within 90 days of issuance date to the Parties' designated *Cy Pres* recipient: Public Counsel.

1 which it responded. Additionally, Neiman produced responsive documents  
2 to Plaintiff, which Plaintiff's counsel analyzed and reviewed. The Parties  
3 also engaged in substantial deposition discovery of both fact witnesses as  
4 well as experts related to Plaintiff's class certification motion. Finally, the  
5 parties fully briefed class certification, which was pending for hearing before  
6 this Court at the time a settlement was reached.

7 Plaintiff's counsel believes, based on past experience in class action  
8 cases, and the discovery conducted here, that the proposed settlement, rather  
9 than continued litigation, is the best option for Settlement Class Members.

10 **D. The Experience and Views of Counsel**

11 Class Counsel's experience suggests the Parties' Settlement is a strong  
12 result for the proposed Class and warrants the Court's approval. Class  
13 Counsel's support for the proposed settlement confers a presumption of  
14 correctness.<sup>11</sup> Class Counsel are experienced class action litigators who have  
15 successfully litigated numerous complex consumer protection class action  
16 cases. After weighing the risks and benefits associated with litigating this  
17 case further, Class Counsel reached the opinion the proposed settlement is in  
18 the best interests of the proposed Class. The Gross Settlement Amount of  
19 \$2,900,000 and corresponding Net Settlement Fund of at least \$1,625,000  
20 (minus Plaintiff's counsel's costs only) represents a substantial recovery to  
21 Settlement Class Members, particularly in light of defenses Neiman has  
22 proffered to Plaintiff's damages claims. Under any circumstances, however,

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23  
24 <sup>11</sup>See *Rodriguez*, 563 F.3d at 965 ("This circuit has long deferred to the  
25 private consensual decision of the parties," citing *Hanlon*, 150 F.3d at 1027);  
26 see also *Linney v. Cellular Alaska P'ship*, C-96-3008 DLJ, 1997 WL  
27 450064, \*5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998)  
28 ("The involvement of experienced class action counsel and the fact that the  
settlement agreement was reached in arm's length negotiations, after relevant  
discovery had taken place create a presumption that the agreement is fair.")

1 payment of the Gross Settlement Amount would be considered a significant  
2 result in the context of a class action. Therefore, this factor weighs in favor  
3 of preliminarily approving the proposed settlement's terms.

4 **E. The Proposed Class Members' Reaction**

5 The class members' reaction to the proposed settlement is not as  
6 meaningful a consideration when a court is determining preliminary approval  
7 of a settlement because notice has not been issued and class members are, as  
8 yet, unaware of the proposed settlement. Class members will receive notice  
9 of the proposed settlement if preliminarily approved, and will have every  
10 opportunity to voice their opinions on the proposed settlement.

11 **F. Lack of Collusion Between the Parties**

12 The trial court's evaluation of the settlement "must be limited to the  
13 extent necessary to reach a reasoned judgment that the agreement is not the  
14 product of fraud or overreaching by, or collusion between, the negotiating  
15 parties, and that the settlement, taken as a whole, is fair, reasonable and  
16 adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688  
17 F.2d 615, 625 (9th Cir. 1982). As discussed above, the proposed settlement  
18 is the product of extensive arms length negotiations between well-informed,  
19 sophisticated counsel. This is a common fund case, and, thus, Plaintiff's  
20 intend to request attorney's fees as percentage of the common fund. Thus,  
21 no discussion or agreement as to attorney's fees was necessary as part of the  
22 negotiation (although Settlement Class Counsel's fees are limited to a  
23 maximum of thirty percent of the Gross Settlement Amount). Further, given  
24 the extensive litigation already conducted, including Plaintiff's successful  
25 Ninth Circuit appeal of this Court's dismissal, both sides have demonstrated  
26 they were prepared to litigate this case through final judgment, if no  
27 acceptable resolution could be reached. In short, there can be no question of  
28 any collusion. Settlement negotiations were a long, drawn out process over

1 many months, utilizing the expertise of the Mediator over the course of  
2 multiple in-person mediation sessions and follow-up correspondence. *See*  
3 *Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at \*4  
4 (N.D.Cal. Apr. 13, 2007) (“The assistance of an experienced mediator in the  
5 settlement process confirms that the settlement is non-collusive.”)

6 **IV. THE PROPOSED NOTICE SHOULD BE APPROVED**

7 Rule 23(e)(1) provides “[t]he court must direct notice in a  
8 reasonable manner to all class members who would be bound by the  
9 proposal.” The Manual for Complex Litigation recommends “[o]nce the  
10 judge is satisfied as to the certifiability of the class and the results of the  
11 initial inquiry into the fairness, reasonableness, and adequacy of the  
12 settlement, notice of a formal Rule 23(e) fairness hearing is given to the  
13 class members. For economy, the notice under Rules 23(c)(2) and the Rule  
14 23(e) notice are sometimes combined.” Manual for Complex Litigation  
15 (Fourth) § 21.633. Combined notice helps avoid confusion that separate  
16 certification and settlement notifications may produce. In evaluating a notice  
17 plan, the question is “whether the class as a whole had notice adequate to  
18 flush out whatever objections might reasonably be raised to the settlement.”  
19 *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

20 Here, the Parties propose to disseminate notice to the Settlement Class  
21 Members via Email Notice to Known Settlement Class Members, Post-Card  
22 Notice if necessary, and Publication Notice and the Settlement Website for  
23 Unknown Class Members. The manner provided for giving such notice in  
24 sections 5.1 and 5.2 of the Settlement Agreement ensures “all [class]  
25 members who can be identified through reasonable effort will be notified,”  
26 and is “the best notice that is practicable under the circumstances.” Fed. R.  
27 Civ. P. 23(c)(2)(B). It is also inherently “reasonable”. Fed. R. Civ. P.  
28 23(e)(1). Section 5.1(a) provides Neiman will identify from its records and



1 submit a list of all Known Settlement Class Members and their last-known  
2 addresses and/or email addresses to the Claims Administrator. It also  
3 provides the Claims Administrator will send the Email Notice to Known  
4 Settlement Class Members. Section 5.1(b) then provides additional  
5 safeguards to maximize notice receipt by Settlement Class Members. In the  
6 event Email Notice is not workable, the Claims Administrator will send  
7 Known Settlement Class Members the Post-Card Notice via U.S. Mail.

8 Section 5.2 provides for Publication Notice and internet notice, and the  
9 Settlement Website to disseminate information and make available Opt-Out  
10 Forms and Claims Forms. Each alternative method is designed to ensure the  
11 maximum number of Settlement Class Members practicable receive notice  
12 under the circumstances.<sup>12</sup> See Fed. R. Civ. P. 23(c)(2)(B).

13 The Email Notice, Post-Card Notice, and Publication Notice, attached  
14 to the Settlement Agreement (Fields Decl., Ex. A) as Exhibits 1, 2, and 3,  
15 respectively contain the requisite information for proper notice of a class  
16 action settlement.<sup>13</sup> See Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii).

17 **V. THE COURT SHOULD ADOPT THE PARTIES' PROPOSED**  
18 **SCHEDULE**

19 The Parties propose a reasonably expeditious schedule giving all  
20 interested persons full opportunity to learn about the proposed Settlement  
21 and have their views considered. The Parties request the following schedule:  
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23 <sup>12</sup> The entire Settlement Agreement, including the proposed Notice, will also  
24 be made available via the internet on the Settlement Website.

25 <sup>13</sup> During the Parties' meet-and-confer discussion prior to the filing of this motion, it  
26 was agreed that a provision should be added to the Email Notice advising recipients  
27 that any objections to the Settlement must include a statement under penalty of  
28 perjury that the objector is a Settlement Class Member. This modification is  
reflected in paragraph 3 of the Proposed Order lodged herewith, and the proposed  
Notice will be modified accordingly.



- All emailing and mailing of notices, where necessary, be completed by the later of thirty (30) days after entry of the Preliminary Approval Order or twenty (20) days after the Claims Administrator receives the list of Known Settlement Class Members from Neiman;
- the deadline for Settlement Class Members to opt out be set for 60 days after the initial mailing of the Notices, or ----- 2018, if Preliminary Approval is granted on the date of the hearing;
- the deadline for objections to the proposed Settlement be set for 60 days after the initial mailing of the Notices, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- the deadline to submit notice of intention to appear at the Fairness Hearing be set for 60 days after the initial mailing of the Notices, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- the deadline to submit all materials in support of the request for Final Approval and Class Counsel's request for approval of attorney's fees and costs and reimbursement of expenses shall be set no later than 28 days before the Fairness Hearing, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- the Claims Administrator be directed to provide to Settlement Class Counsel a list of all Non-Participating Class Members not later than 14 days after the deadline for submission of Opt-Out Forms, or -----, 2018, if Preliminary Approval is granted on the date of the hearing;
- The Claims Administrator be directed to serve on Settlement Class Counsel and Defendant's Counsel and file with the Court (or arrange for Settlement Class Counsel to file with the Court) a declaration of due diligence setting forth its compliance with its obligations under the Settlement Agreement not later than 14 days prior to the Final Approval Hearing;
- the Fairness Hearing be set no earlier than 120 days after entry of the Preliminary Approval Order, or -----, 2018, if Preliminary Approval is granted on the date of the hearing.

## **VI. CONCLUSION**

For the reasons discussed above, Plaintiff requests the Court enter the Preliminary Approval Order concurrently filed and lodged herewith.

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**KIRTLAND & PACKARD LLP**

DATED: April 20, 2018

By: /s/ Joshua A. Fields  
MICHAEL LOUIS KELLY  
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